

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

DARRYL CHERRY	§	
v.	§	CIVIL ACTION NO. 9:04cv192 (Crim. No. 9:99cr13)
UNITED STATES OF AMERICA	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION  
OF THE UNITED STATES MAGISTRATE JUDGE  
AND ENTERING FINAL JUDGMENT

The Movant Darryl Cherry, proceeding *pro se*, filed this motion to vacate or correct his sentence under 28 U.S.C. §2255. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Cherry was convicted of possession with intent to distribute cocaine on April 28, 2000, receiving a sentence of 121 months in prison. His grounds for relief relied on the case, pending at the time he filed his petition, of U.S. v. Booker, 125 S.Ct. 738 (2005).

After Booker was decided, the Magistrate Judge ordered the Government to answer Cherry's petition. The Government filed an answer arguing that Booker did not apply retroactively and that Cherry's claims are barred by the statute of limitations. Cherry did not file a response to the answer.

On July 22, 2005, the Magistrate Judge entered a Report recommending that the motion to vacate or correct sentence be denied. Cherry did not file objections to the Report; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district

court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings in this cause and the Report of the Magistrate Judge. Upon such review, the Court has determined that the Magistrate Judge's Report is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled motion to vacate or correct sentence be and hereby is DISMISSED with prejudice. It is further

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

So **ORDERED** and **SIGNED** this **18** day of **October, 2005**.



---

Ron Clark, United States District Judge